

United States General Accounting Office

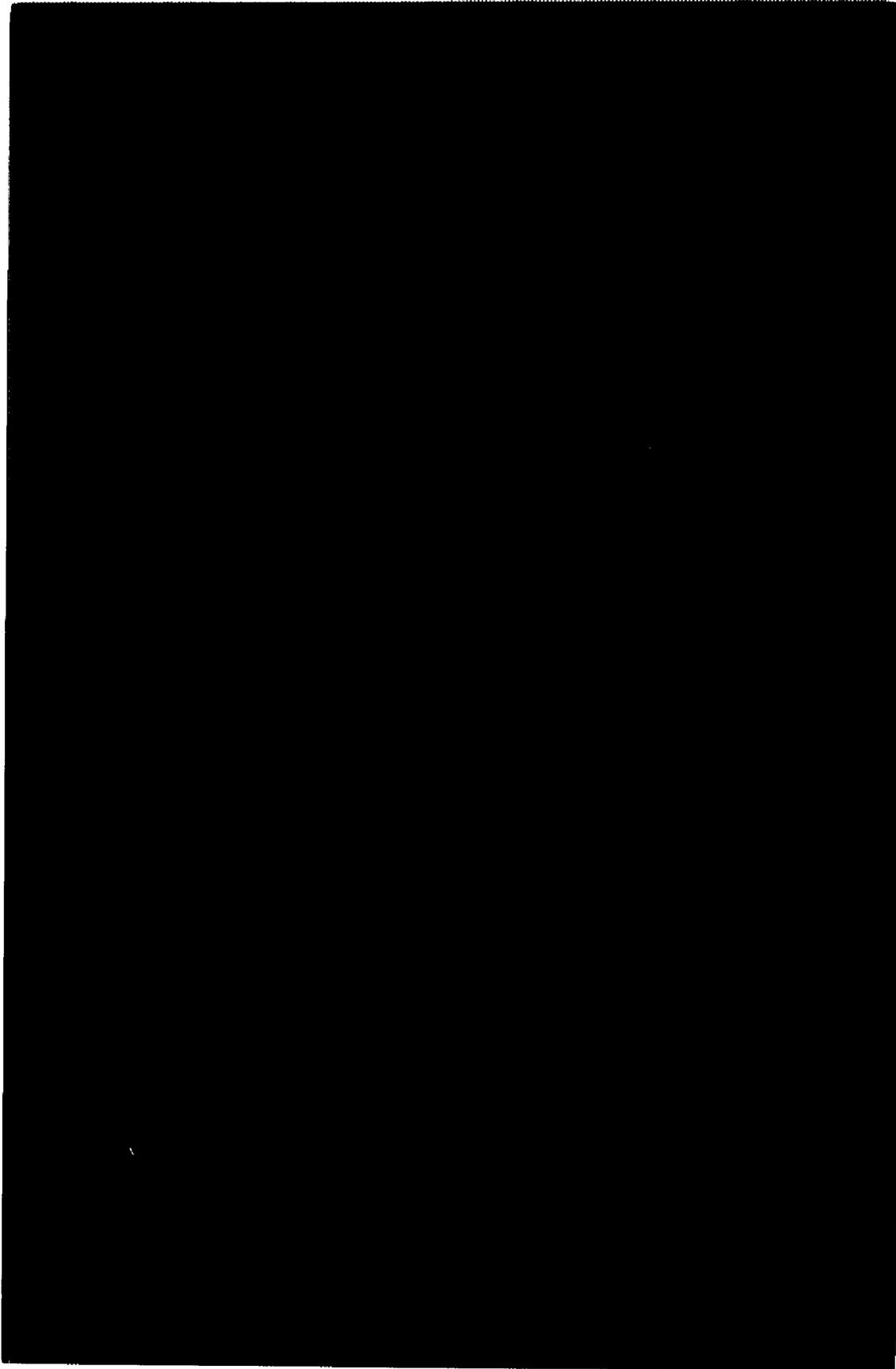
**GAO**

Office of General Counsel

July 1988

**Digests of Unpublished  
Decisions of the  
Comptroller General  
of the United States**

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United States General Accounting Office

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## PREFACE

This publication is one in a series of monthly pamphlets entitled "Digests of Unpublished Decisions of the Comptroller General of the United States" which have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. A disbursing or certifying official or the head of an agency may request a decision from the Comptroller General pursuant to 31 U.S. Code § 3529 (formerly 31 U.S.C. §§ 74 and 82d). Decisions in connection with claims are issued in accordance with 31 U.S. Code § 3702 (formerly 31 U.S.C. § 71). Decisions on the validity of contract awards are rendered pursuant to the Competition in Contracting Act, 98 Pub. L. 369, July 18, 1984.

Decisions in this pamphlet are presented in digest form and represent approximately 90 percent of the total number of decisions rendered annually. Full text of these decisions are available through the circulation of individual copies and should be cited by the appropriate file number and date, e.g., B-219654, Sept. 30, 1986.

The remaining 10 percent of decisions rendered are published in full text. Copies of these decisions are available through the circulation of individual copies, the issuance of monthly pamphlets and annual volumes. Decisions appearing in these volumes should be cited by volume, page number and year issued, e.g., 65 Comp. Gen. 624 (1986).



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**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Appropriation Availability** B-230755 July 6, 1988

**Amount availability**

**Fiscal-year appropriation**

**Appropriation restrictions**

**Additional compensation**

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Appropriation Availability**

**Purpose availability**

**Specific purpose restrictions**

**Watershed projects**

**Reclamation**

The Environmental Protection Agency (EPA) may not make payments mandated by section 512 of the Water Quality Act of 1987 from its fiscal year 1988 appropriations. Section 512 directs the EPA Administrator to make the payments "to the extent provided in Appropriations Acts." This language requires specific reference to the payments in an appropriation act. Since EPA's fiscal year appropriations contain no such reference, they may not be used to make the payments.

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Federal Assistance**

**B-230735 July 20, 1988**

**Grants**

**Matching funds**

**Administrative regulations**

**Authority**

Drake University may use income from an endowment fund trust provided by a special appropriation through the Legal Services Corporation to support a University Legal Clinic for local matching funds in grant applications with other federal agencies, provided the use of such funds is consistent with the grant agreement under which the endowment fund trust was provided.

**CIVILIAN PERSONNEL**

**CIVILIAN PERSONNEL**

**B-229187 July 12, 1988**

**Compensation  
Overpayments  
Error detection  
Debt collection  
Waiver**

An employee was overpaid when the correct amount was not deducted from his salary for health insurance premiums. Upon the employee's transfer to a new agency, the premiums for a less expensive health plan were deducted from his salary. The employee seeks waiver of his debt to the government under 5 U.S.C. § 5584 (1982). Waiver may be granted where the amount of the overpayment was small each pay period, the employee's salary fluctuated at the time of the error, and employee continued to be covered by and file claims under the same health insurance plan.

**CIVILIAN PERSONNEL**

**B-217402.2 July 15, 1988**

**Compensation  
Debt collection  
Set-off  
Legislative/judicial personnel**

The opinion in B-217402, June 10, 1985, is clarified with the explanation that GAO believes the provisions of 5 U.S.C. § 5514 (1982) do not apply to the House of Representatives or other institutions within the executive, legislative, or judicial branches, unless they are properly classifiable as "departments," "agencies," or "independent establishments." Nevertheless, salary offset can still be taken against employees of the House of Representatives under 31 U.S.C. § 3716 (1982), or other applicable statutes.

CIVILIAN PERSONNEL

B-230365 July 25, 1988

Relocation

Actual expenses

Eligibility

Distance determination

The National Park Service denied an employee's claim for reimbursement of relocation expenses in connection with a short-distance transfer within the Shenandoah National Park. The employee was required to vacate a government-owned house at his old duty station, which he had been required to reside in as a condition of employment. The expenses may be allowed since the employee's relocation of residence was clearly required by his official change of station, notwithstanding that the transfer occurred within the park boundaries and that the net increase in commuting distance was less than 10 miles.

MILITARY PERSONNEL

MILITARY PERSONNEL

B-231476 July 12, 1988

Pay

Overpayments

Error detection

Debt collection

Waiver

MILITARY PERSONNEL

Pay

Overpayments

Interest

Waiver

A former Navy member's failure to notice and seek corrective action regarding the Navy's erroneous calculations of his leave balances, resulting in overpayments to him, precludes the Comptroller General from waiving his indebtedness to the government under 10 U.S.C. § 2774 where the member reasonably should have recognized the errors. By regulation, however, interest on such indebtedness does not accrue while the waiver request is pending.

MILITARY PERSONNEL  
Relocation  
Household goods  
Shipment costs  
Rates  
Propriety

B-229259 July 25, 1988

MILITARY PERSONNEL  
Relocation  
Household goods  
Temporary storage  
Rates  
Propriety

The Army may not reimburse an employee under the commuted rate system for the costs of storage and transportation of household goods by privately owned vehicle from the continental United States to Alaska incident to a permanent change of station. The employee's travel order erroneously authorized storage and transportation under the commuted rate system; the commuted rate system is applicable only to transfers where both old and new stations are within the conterminous 48 states and the District of Columbia. However, the employee may be reimbursed his actual moving expenses (such as gasoline, oil, truck rental and tolls) and temporary storage costs not to exceed what the constructive cost would have been to the government under the Government Bill of Lading method.





**PROCUREMENT**

**B-230313; B-230313.2 Con't**

**Competitive Negotiation**

**July 5, 1988**

**Discussion reopening**

**Propriety**

**Best/final offers**

**Non-prejudicial allegation**

Without reopening discussions and after receipt of best and final offers, an agency can delete from the award 18 subline items that constitute 1.21 percent of the protester's high total cost and 5.4 percent of the awardee's low total cost, where there is a substantial cost difference between these offerors and a stated urgency, since the protester is not prejudiced by this change in requirements.

**PROCUREMENT**

**Competitive Negotiation**

**Offers**

**Acceptance**

**Propriety**

Where an offeror states in detail in its proposal that it meets solicitation requirements and the agency confirms the offeror's compliance during discussions, the agency had a reasonable basis for determining the proposal was acceptable.

**PROCUREMENT**

**Competitive Negotiation**

**Offers**

**Evaluation**

**Prices**

**Unbalanced offers**

Where a price proposal under a RFP is not mathematically unbalanced there is no basis to reject it as materially unbalanced.

**PROCUREMENT**

**B-230313; B-230313.2 Con't**

**Contract Management**

**July 5, 1988**

**Contract modification**

**Cardinal change doctrine**

**Criteria**

**Determination**

A cardinal change to a contract requiring resolicitation of the requirement occurs where the essential purpose of the contract has been changed. A potential ambiguity concerning whether the contract covers one item that may lead to a contract modification, but which does not change the contract's essential purpose, is not a cardinal change.

**PROCUREMENT**

**Contractor Qualification**

**Responsibility**

**Contracting officer findings**

**Affirmative determination**

**GAO review**

The General Accounting Office will not review an affirmative determination of responsibility by the contracting officer, absent a showing of fraud or bad faith on the part of the contracting agency or an alleged failure of the agency to apply definitive responsibility criteria.



**PROCUREMENT**  
**Competitive Negotiation**  
**Offers**  
**Evaluation**  
**Personnel**  
**Bias**

**B-230669 Con't**  
**July 5, 1988**

Agency could reasonably conclude that one offeror's proposed clearinghouse, which relied heavily on parent organization's existing relationships as conduit for required communications with outside entities, offered less assurance of impartiality and objectivity than that of another offeror, which proposed that its clearinghouse establish its own linkages independent of the parent organization.

**PROCUREMENT**  
**Competitive Negotiation**  
**Offers**  
**Evaluation errors**  
**Non-prejudicial allegation**

Protester was not prejudiced by exclusion from final evaluation summary of one evaluator's scores reported by telephone without accompanying narrative, because even with scores, protester would still be lower rated technically and higher in cost.



**PROCUREMENT**  
**Sealed Bidding**  
**Bonds**

**B-231086 July 5, 1988**  
**88-2 CPD 8**

**Federal procurement regulations/laws**  
**Deviation**

Federal Acquisition Regulation (FAR), deviation which precludes the use of individual sureties as security for bid, payment and performance bonds unless such individual sureties deposit adequate tangible assets with the government is not objectionable where the deviation was properly authorized under the FAR and is a temporary element of a pilot contracting program aimed at improving the efficiency of the agency's procurement efforts.

**PROCUREMENT**  
**Competitive Negotiation**  
**Best/final offers**

**B-231095 July 5, 1988**  
**88-2 CPD 9**

**Price data**  
**Omission**  
**Effects**

Agency properly allowed offeror to correct price omission in its best and final offer (BAFO), without reopening discussions with other offerors in the competitive range, where offeror's pricing pattern throughout negotiation process indicated intent to offer the same price for the omitted item as it offered for same item in its initial proposal and for similar item in its BAFO.

**PROCUREMENT**  
**Bid Protests**  
**Dismissal**

**B-231575 July 5, 1988**  
**88-2 CPD 10**

**Propriety**  
**Pending protests**

Protest of allegedly improper procurement is dismissed while protest filed by an interested third party involving the same procurement is pending before the General Services Administration Board of Contract Appeals.

**PROCUREMENT**  
**Competitive Negotiation**  
**Requests for proposals**  
**Competition rights**  
**Contractors**  
**Exclusion**

**B-230316 July 6, 1988**  
**88-2 CPD 11**

Failure of agency to provide previous subcontractor with copy of solicitation for items it supplied to prime contractor does not provide a basis for requiring agency to resolicit where agency did not deliberately exclude the firm from competition, it otherwise made reasonable efforts to publicize and distribute the solicitation, 11 proposals were received, and the subcontractor did not avail itself of every reasonable opportunity to obtain the solicitation after reading the synopsis of the procurement in the Commerce Business Daily.

**PROCUREMENT**  
**Bid Protests**  
**GAO procedures**  
**Protest timeliness**  
**10-day rule**

**B-230608; B-230609**  
**July 6, 1988**  
**88-2 CPD 12**

Where protester orally complained during discussions in November 1987 that its competitors replaceable pad tracks for the M1 Abrams Tank were being evaluated only on the average mileage obtained from one of two proving ground test sites and the Army explained its evaluation basis, protest that the evaluation was insufficient, filed after award in March 1988, is untimely.

**PROCUREMENT**  
Competitive Negotiation  
Requests for proposals  
Evaluation criteria  
Weighting  
Bias allegation

**B-230608; B-230609 Con't**  
**July 6, 1988**

Protest that Army failed to provide computer program to protester showing weights and values of inputs evaluated for life cycle cost is denied since the solicitation advised offerors of the broad scheme of scoring to be employed and gave reasonably definite information concerning the relative importance of evaluation factors. The precise numerical weight to be used in evaluation need not be disclosed.

**PROCUREMENT**  
Competitive Negotiation  
Contract awards  
Administrative discretion  
Cost/technical tradeoffs  
Technical superiority

**B-230692 July 6, 1988**  
**88-2 CPD 13**

Proposed awards to higher priced, higher technically ranked offerors are not objectionable where the solicitation award criteria made technical considerations more important than cost and the contracting officer reasonably concluded that the protester's lower proposed price did not outweigh the technical advantages demonstrated in its competitors' higher priced proposals.

**PROCUREMENT**  
Competitive Negotiation  
Discussion  
Adequacy  
Criteria

A protester is not prejudiced by alleged agency failure to apprise it during discussions of all weaknesses in its proposal, where it does not claim that it could or would have improved its proposal as a result of the discussions.



**PROCUREMENT**  
**Sealed Bidding**  
**Bids**

**B-229786.2 July 7, 1988**  
**88-2 CPD 17**

**Cost estimates**  
**Risk assumption**

The procuring activity is under no legal obligation to eliminate risk entirely from a procurement and prospective bidders are expected to take added risks into account when preparing their bids.

**PROCUREMENT**

**Specifications**  
**Minimum needs standards**  
**Competitive restrictions**  
**Design specifications**  
**Justification**

Protest against maintenance dredging solicitation requirement that bids shall be based on an estimate for achieving a fixed depth set by the procuring activity, rather than on an estimate for a maximum allowable over-depth, is denied. The requirement reasonably was imposed in part to preclude unbalanced bidding by removing a bid element calculated at a fixed maximum for bid comparisons, but subject to significant variance by the contractor during performance, which affects the price actually paid by the government.

**PROCUREMENT**

**Special Procurement**  
**Methods/Categories**

**B-230794 July 7, 1988**  
**88-2 CPD 18**

**In-house performance**  
**Cost estimates**  
**Contract administration**  
**Personnel**

Agency determination of the staffing level required to accomplish the performance work statement under Office of Management and Budget Circular A-76, cost comparison will not be questioned where the record does not show the determination was made in a manner tantamount to fraud or bad faith.



**PROCUREMENT**

**B-231072.2 July 7, 1988**

**Bid Protests**

**88-2 CPD 21**

**GAO procedures**

**Protest timeless**

**Apparent solicitation improprieties**

General Accounting Office will not consider a protest of an agency's request for second best and final offers where the protest was not filed prior to the date on which the second best and final offers were due.

**PROCUREMENT**

**Competitive Negotiation**

**Discussion reopening**

**Propriety**

As a general matter, an agency may reopen negotiations and request a second round of best and final offers when it is in the government's best interest to do so.

**PROCUREMENT**

**B-231144 July 7, 1988**

**Bid Protests**

**88-2 CPD 22**

**GAO procedures**

**Protest timeliness**

**Apparent solicitation improprieties**

Protest that estimated quantities stated in solicitation are wrong is untimely, since it was not filed before bid opening.

**PROCUREMENT**

**Sealed Bidding**

**Contract awards**

**Propriety**

A contract in a sealed bid procurement must be awarded on the basis of the factors stated in the invitation for bids.







**PROCUREMENT**  
Bid Protests  
Moot allegation  
GAO review

**B-230831 July 8, 1988**  
**88-2 CPD 28**

Protests by small business offeror that agency should not have rejected its bid samples as unacceptable without first allowing it an opportunity to correct any deficiencies are dismissed as academic where contracting officer dissolved small business set-asides after determining that protester's prices were unreasonable and protester will be given an opportunity to compete for unrestricted requirements.

**PROCUREMENT**  
Socio-Economic Policies  
Small business set-asides  
Use  
Administrative discretion

Protests of withdrawal of small business set-asides are denied where contracting officer reasonably determined, based on a comparison of offeror's prices for large business-manufactured kits with its prices for 50-percent small business-manufactured kits that the latter prices were unreasonable.

**PROCUREMENT**  
Bid Protests  
Bias allegation  
Allegation substantiation  
Evidence sufficiency

**B-230876 July 8, 1988**  
**88-2 CPD 29**

Where the protester has not submitted virtually irrefutable proof of bias, there is no basis for finding that contracting officials showed favoritism toward the protester's competitor in defining the requirement.

**PROCUREMENT**

**B-230876 Con't**

**Competitive Negotiation  
Requests for quotations  
Cancellation  
Resolicitation**

**July 8, 1988**

Cancellation of a request for quotations does not result in an improper auction upon resolicitation where the cancellation was in accord with the governing legal requirements.

**PROCUREMENT**

**Special Procurement Methods/Categories  
Federal supply schedule  
Mandatory use**

**PROCUREMENT**

**Special Procurement Methods/Categories  
Federal supply schedule  
Offers  
Rejection  
Propriety**

Where the estimated dollar amount of a procurement exceeds the maximum order limitation stipulated in a mandatory Federal Supply Schedule, the procuring agency's issuance of solicitations for the purpose of price comparisons is proper.

**PROCUREMENT**

**Specifications  
Minimum needs standards  
Competitive restrictions  
Design specifications  
Burden of proof**

Specification requiring that cabinet flipper doors retract toward the inside is not unduly restrictive where the agency explains that the specification is necessary to meet the minimum needs of the agency, and the protester does not show it to be unreasonable.



**PROCUREMENT**

**Bid Protests  
GAO procedures  
Protest timeliness  
10-day rule**

**B-231810; B-231811**

**July 8, 1988  
88-2 CPD 32**

Protest that agency should have awarded contract to protester on a sole-source basis is dismissed as untimely where it is filed with the General Accounting Office more than 10 working days after the protester learns its agency-level protest on the same issue has been denied.

**PROCUREMENT**

**Bid Protests  
GAO procedures  
Purposes  
Competition enhancement**

The General Accounting Office will not review a protest that the protester should have received a sole-source award.

**PROCUREMENT**

**Contract Management  
Contract administration  
GAO review**

**B-231812 July 11, 1988**

**88-2 CPD 33**

General Accounting Office does not consider matters of contract administration as part of its bid protest function.



**PROCUREMENT** B-230647 Con't  
Noncompetitive Negotiation July 12, 1988  
Use  
Justification  
Industrial mobilization bases

**PROCUREMENT**  
Noncompetitive Negotiation  
Use  
Justification  
National defense interests

The Maritime Administration is authorized under the Competition in Contracting Act of 1984, 41 U.S.C. § 253(c)(3), to use other than competitive procedures in instances where it is necessary for national emergency or industrial mobilization purposes to award a contract to a particular source or sources.

**PROCUREMENT** B-230943 July 12, 1988  
Competitive Negotiation 88-2 CPD 38  
Best/final offers  
Clerical errors

Protest that agency accepted a nonconforming best and final proposal is denied when the only reasonable reading of the proposal is that, while it referred to the wrong packaging specification, it nevertheless represented an offer to meet all the solicitation's material requirements.

**PROCUREMENT** **B-231115 July 12, 1988**  
**Socio-Economic Policies 88-2 CPD 39**  
**Small business 8(a) subcontracting**  
**Administrative regulations**  
**Compliance**  
**GAO review**

**PROCUREMENT**  
**Socio-Economic Policies**  
**Small business 8(a) subcontracting**  
**Use**  
**Administrative discretion**

Protest of Small Business Administration's alleged failure to prepare an impact analysis for the Small Business Act's section 8(a) program is denied where the 8(a) contract is for services not previously procured from small business.

**PROCUREMENT**  
**Socio-Economic Policies**  
**Small business 8(a) subcontracting**  
**Definition**

Section 8(a) subcontracting program is a noncompetitive procedure established by statute which grants contracting agencies broad discretion to determine the appropriateness of an 8(a) award, and which does not require publication of the proposed procurement action.

**PROCUREMENT** **B-231173 July 12, 1988**  
**Specifications 88-2 CPD 40**  
**Brand name specifications**  
**Equivalent products**  
**Acceptance criteria**

Protester's allegation that the brand name product offered by the awardee does not conform to the brand name requested in the solicitation is without merit where the product offered is identical to the brand name solicited and has been successfully tested by the agency.

**PROCUREMENT** B-227122.3; B-227122.4  
Competitive Negotiation July 13, 1988  
Best/final offers 88-2 CPD 41  
Rejection  
Price reasonableness  
Risks

Weaknesses in offeror's proposal with respect to mission suitability and financial condition (where solicitation provided for consideration of financial condition and capability in the evaluation of technical proposals) provide a reasonable basis for selection of another more highly evaluated offeror.

**PROCUREMENT** B-228599.2 July 13, 1988  
Competitive Negotiation 88-2 CPD 42  
Contract awards  
Errors  
Corrective actions  
Non-prejudicial allegation

Even where agency should have pointed out an evaluated proposal deviation to the protester, and even though the agency made an upward adjustment in the offeror's probable costs in the cost analysis when the offeror did not correct its offer in its revised proposal, the protester is not prejudiced where the award selection of a higher technically rated offeror would not have been changed, even if the upward probable cost adjustment had not been made.

**PROCUREMENT** **B-228599.2 Con't**  
**Competitive Negotiation July 13, 1988**  
**Contracting officer duties**  
**Effects**  
**Advisory opinions**

Agency failure to consider late submitted Defense Contract Audit Agency (DCAA) audits of offerors' cost proposals in its probable cost analysis is reasonable, where DCAA verbally advised that there were no significant differences between the cost proposals and the DCAA report recommendations. DCAA audits are only advisory; the degree to which they are used is a matter for the contracting officer to decide.

**PROCUREMENT** **B-231001 July 13, 1988**  
**Sealed Bidding 88-2 CPD 44**  
**Contract awards**  
**Default termination**  
**Performance sureties**

Pursuant to reprocurement for default, contracting agency acted properly in accepting surety's proposal to have the contract work completed at the defaulted contract price by a contractor that did not bid on the original procurement; agency was not required to reprocure from next low bidder on original procurement.

**PROCUREMENT** **B-231168.2 July 13, 1988**  
**Bid Protests 88-2 CPD 46**  
**GAO procedures**  
**GAO decisions**  
**Reconsideration**

Request for reconsideration is denied where request contains no statement of facts or legal grounds warranting reversal but merely restates arguments made by the protester and previously considered by the General Accounting Office.

**PROCUREMENT**  
Bid Protests  
Moot allegation  
GAO review

**B-231629 July 13, 1988**  
**88-2 CPD 45**

Protest against amendment repealing solicitation's small business recertification requirement is dismissed as academic where the Small Business Administration has found that proposed awardee is a small business and no immediate purpose would be served by our review of the matter.

**PROCUREMENT**  
Socio-Economic Policies  
Small businesses  
Size standards  
Administrative discretion

Since the Small Business Administration has conclusive authority to determine small business status for federal procurement purposes, the General Accounting Office does not consider size status protests.

**PROCUREMENT**  
Contractor Qualification  
Responsibility  
Contracting officer findings  
Collusion

**B-231846 July 13, 1988**  
**88-2 CPD 47**

Protest that low bidder engaged in collusive bidding is dismissed because the issue is for resolution first by the contracting officer in the context of a responsibility determination and then, if collusion is suspected, by the Attorney General in a criminal investigation.



**PROCUREMENT**  
**Bid Protests**  
**Definition**

**B-230921 July 14, 1988**  
**88-2 CPD 51**

**PROCUREMENT**  
**Bid Protests**  
**GAO authority**

Protest against determination by agency to exclude protester as a planned producer for a future procurement is not for consideration under General Accounting Office's bid protest function since protester's objection does not pertain to a particular solicitation or to the proposed award or award of a particular contract and thus is not within the scope of the bid protest provisions of the Competition in Contracting Act of 1984.

**PROCUREMENT**  
**Bid Protests**  
**GAO procedures**  
**Protest timeliness**  
**Apparent solicitation improprieties**

**B-231692 July 14, 1988**  
**88-2 CPD 52**

Protest against award to a firm listed in solicitation as an approved source is, in effect, a protest of alleged solicitation improprieties which must be filed prior to the closing date for receipt of proposals and will not be considered by General Accounting Office when it was initially filed with the contracting agency after the closing date.

**PROCUREMENT** B-231915 July 14, 1988  
Contractor Qualification 88-2 CPD 53  
Responsibility  
Contracting officer findings  
Affirmative determination  
GAO review

**PROCUREMENT**  
Contractor Qualification  
Responsibility/responsiveness distinctions  
Equal employment/affirmative action

Protest alleging that low bidder is nonresponsive for failure to comply with affirmative action requirements of the solicitation and federal procurement law is dismissed, since compliance with these requirements concerns the bidder's responsibility and the General Accounting Office generally will not review a contracting officer's affirmative responsibility determination.

**PROCUREMENT** B-208159.13 July 15, 1988  
Bid Protests  
Allegation investigation  
GAO review

Letter responding to inquiry from Senator David Pryor discusses how GAO handles allegations raised in bid protests relating to fraud or other violations of federal criminal law.



**PROCUREMENT**

**Bid Protests**  
**Agency-level protests**  
**Protest timeliness**  
**GAO review**

**B-231669.2 July 15, 1988**

**88-2 CPD 58**

**PROCUREMENT**

**Bid Protests**  
**GAO procedures**  
**Protest timeliness**  
**10-day rule**  
**Adverse agency actions**

Where a firm initially protested to the contracting activity alleging a solicitation is overly restrictive prior to the closing date for receipt of proposals, the agency's opening of initial proposals without taking the requested corrective action constitutes initial adverse agency action, such that a protest to the General Accounting Office (GAO) 4 weeks later, based on agency's written denial of the agency-level protest, is untimely under GAO's Bid Protest Regulations.

**PROCUREMENT**

**B-230724 July 18, 1988**

**Contractor Qualification 88-2 CPD 59**

**Responsibility criteria**

**Distinctions**

**Performance specifications**

**PROCUREMENT**

**Sealed Bidding**

**Contract awards**

**Government delays**

**Propriety**

The contracting officer properly delayed award of contracts for helicopter services in order to allow the Federal Aviation Administration (FAA) to certify the helicopters offered to operate in the manner and in conditions specified in the invitation. As the helicopters were capable of meeting the performance specifications at all times pertinent to the protest, the issue of the FAA's certifying the helicopters to operate was a matter of responsibility that properly could be resolved after bid opening.

**PROCUREMENT**

**Sealed Bidding**

**Bids**

**Responsiveness**

**Determination criteria**

A bid to provide a helicopter for fighting fires and other services is responsive where the bid does not qualify or limit the offeror's obligation to supply a helicopter that can operate in accord with the material performance requirements set forth in the invitation for bids.

**PROCUREMENT**  
**Bid Protests**  
**Moot allegation**  
**GAO review**

**B-230798 July 18, 1988**  
**88-2 CPD 60**

Protester, who objects to the application of a revised statutory cost limitation which was not incorporated into the solicitation, has made no showing that it would have bid differently had the revised limitation been incorporated.

**PROCUREMENT**  
**Sealed Bidding**  
**Contract awards**  
**Propriety**

Notwithstanding the agency's failure to update a solicitation notice to reflect the most current statutory cost limitation, General Accounting Office has no objection to a proposed award to the low bidder whose bid, while not conforming to the limitation notice in the solicitation, did not exceed the actual cost statutory limitation.

**PROCUREMENT**  
**Competitive Negotiation**  
**Requests for proposals**  
**Cancellation**  
**Justification**  
**GAO review**

**B-231067.2 July 18, 1988**  
**88-2 CPD 63**

Cancellation of solicitation is proper where procuring agency determines it no longer requires the solicited item.

**PROCUREMENT**

**B-228593.2 July 19, 1988**

**Specifications**

**88-2 CPD 64**

**Minimum needs standards**

**Administrative regulations**

**Statutes**

**Implementation**

**PROCUREMENT**

**Specifications**

**Minimum needs standards**

**Competitive restrictions**

**Justification**

**Sufficiency**

Decision is affirmed that a solicitation for educational services issued on a Pacific theater-wide basis does not contravene a statutory provision which calls for multiple offerors, but also provides that the Department of Defense (DOD) may conduct procurements for such services in a manner to avoid unnecessary duplication of offerings consistent with ensuring alternate offerors to the maximum extent feasible. Thus DOD properly could limit the number of service providers on a theater-wide basis on feasibility or unnecessary duplication grounds.

**PROCUREMENT**

**B-231747.2 July 19, 1988**

**Bid Protests**

**88-2 CPD 65**

**GAO procedures**

**Preparation costs**

**PROCUREMENT**

**Bid Protests**

**Moot allegation**

**GAO review**

Where a protest is dismissed as academic, there is no decision on the merits and, therefore, no basis on which the costs of filing and pursuing the protest may be recovered.

<b>PROCUREMENT</b>	<b>B-231774; B-231778</b>
<b>Bid Protests</b>	<b>July 20, 1988</b>
<b>Patent infringement</b>	<b>88-2 CPD 66</b>
<b>GAO review</b>	

Claim of possible patent infringement does not provide a basis for the General Accounting Office (GAO) to object to an award since questions of patent infringement are not encompassed by GAO's bid protest function.

**PROCUREMENT**  
**Socio-Economic Policies**  
**Small business set-asides**  
**Cancellation**  
**Justification**

Where price submitted by sole small business offeror is unreasonable inasmuch as it is twice that of the government estimate, contracting agency had a reasonable basis for cancellation of total small business set-aside solicitation.

<b>PROCUREMENT</b>	<b>B-230839 July 21, 1988</b>
<b>Bid Protests</b>	<b>88-2 CPD 67</b>
<b>Moot allegation</b>	
<b>GAO review</b>	

Protest that the agency deprived protester of opportunity to compete because the agency did not provide it with a copy of the solicitation is denied where the record shows that although the agency did not prepare a solicitation mailing list, otherwise reasonable efforts were made to publicize and distribute the solicitation; the protester in fact secured a copy before proposals were due; and three proposals were received.

Protest that notice in the Commerce Business Daily was misclassified is denied where the record shows that the procurement, a consolidated management contract, was correctly classified under the section for services to operate and maintain a government facility.

**PROCUREMENT**  
Bid Protests  
Wage rates  
GAO review

B-230839 Con't  
July 21, 1988

**PROCUREMENT**  
Competitive Negotiation  
Requests for proposals  
Defects  
Evaluation criteria

The General Accounting Office does not consider the accuracy of the Department of Labor wage determinations issued in connection with solicitations subject to the Service Contract Act.

**PROCUREMENT**  
Competitive Negotiation  
Contract awards  
Government delays  
Justification

Whether an agency may fail to meet a target award date due to the unavailability of funds is a matter of procedure and does not invalidate a procurement or provide a basis for protest.

**PROCUREMENT**  
Socio-Economic Policies  
Small business set-asides  
Use  
Administrative discretion

General Accounting Office did not violate Small Business Administration regulations by deciding not to set aside a procurement for small business where there was reason to expect offers from at least two responsible business concerns.



**PROCUREMENT**  
Contract Management  
Contract administration  
Contract terms  
Modification

**B-230816 Con't**  
**July 22, 1988**

Post-award decision to extend date for closing of sale of real property is a matter of contract administration, which is the function and responsibility of contracting agency, and will not be reviewed by General Accounting Office where record does not establish that contract was awarded with the intention that its terms would be modified to the prejudice of unsuccessful bidders, or that the changed contract is materially different from the contract on which the competition was based.

**PROCUREMENT**  
Socio-Economic Policies  
Small businesses  
Competency certification  
Eligibility  
Criteria

**B-230862 July 22, 1988**  
**88-2 CPD 71**

Small Business Administration (SBA) determination of ineligibility for a certificate of competency on the basis that the bidder has not met the requirement under the SBA regulations that it perform a significant portion of the contract work with its own facilities and personnel is tantamount to an affirmation of the agency's original determination of nonresponsibility and therefore is not subject to further review by the General Accounting Office except in limited circumstances not present in this case.

**PROCUREMENT**

**Bid Protests**

**GAO Procedures**

**Protest timeliness**

**10-day rule**

**B-230965; B-230966**

**July 22, 1988**

**88-2 CPD 72**

Protest that solicitation's "scope of work" provision was vague and poorly written is dismissed as untimely where not asserted until after award of the contract, well beyond the closing date for receipt of proposals.

**PROCUREMENT**

**Contractor Qualification**

**Responsibility**

**Contracting officer findings**

**Affirmative determination**

**GAO review**

Protests challenging the management competence of proposed awardee concerns agency's affirmative determination of responsibility which, in this case, is not a matter for consideration under the Bid Protest function of the General Accounting Office.

**PROCUREMENT**

**Socio-Economic Policies**

**Small businesses**

**Contract awards**

**Eligibility**

Protests that proposed awardee is not eligible for award under Buy Indian Act small business set-asides is denied where there is no indication of record that determination of awardee's eligibility was other than proper.

**PROCUREMENT**  
**Bid Protests**  
**Moot allegation**  
**GAO review**

**B-230994 July 22, 1988**  
**88-2 CPD 73**

Protest that solicitation contains inadequate data is denied where the solicitation in fact includes the data the protester requests. In any event, solicitations need not be drafted to eliminate all uncertainties and risks of performance.

**PROCUREMENT**  
**Contract Disputes**  
**Liquidated damages**  
**Amount determination**

Liquidated damages rates are not improper just because they are based on the costs of reperforming the unsatisfactory services with government employees where such costs reasonably reflect the measure of damages.

**PROCUREMENT**  
**Specifications**  
**Minimum needs standards**  
**Risk allocation**  
**Performance specifications**

Protest that compensation rate set out in cleaning services solicitation for up to 200 additional hours of unspecified service is too low to cover the contractor's costs is denied, since the services are very limited in the context of the contract, and since the contractor clearly can cover any risk of undercompensation in its overall bid price.

**PROCUREMENT**

**Bid Protests**

**GAO procedures**

**Interested parties**

**B-231438 July 22, 1988**

**88-2 CPD 74**

Where a small business set-aside is found to be proper, a large business protester is not an interested party for the purpose of protesting the agency's decision to conduct negotiations rather than solicit bids.

**PROCUREMENT**

**Socio-Economic Policies**

**Small business set-asides**

**Use**

**Justification**

General Accounting Office will not object to agency's decision to set aside procurement for small business concerns where the record indicates the contracting officer had a reasonable expectation that offers would be obtained from at least two small business concerns and that an award would be made at a reasonable price.

**PROCUREMENT**

**Bid Protests**

**GAO procedures**

**Protest timeliness**

**Apparent solicitation improprieties**

**B-230809 July 25, 1988**

**88-2 CPD 76**

Allegation that source approval testing is unavailable and thus should be waived for protester is untimely, and will not be considered, where solicitation clearly called for source approval, but protest was not filed until after deadline for receipt of proposals; Bid Protest Regulations require that alleged solicitation deficiencies be protested prior to proposal submission deadline.

**PROCUREMENT**

Contract Management  
Contract administration  
Default termination  
GAO review

B-230878 July 25, 1988  
88-2 CPD 77

**PROCUREMENT**

Contract Management  
Contract administration  
GAO review

Propriety of prime contractor's alleged termination of the protester's contract for default and the Department of Energy's decision to withhold funds under the protester's contract in response to its lawsuit are questions of contract administration and therefore are not reviewable under our bid protest function.

**PROCUREMENT**

Contractor Qualification  
Organizational conflicts of interest  
Allegation substantiation  
Evidence sufficiency

Prime contractor's decision to exclude the protester from competing for a small purchase order which would have required the protester to test and evaluate its own product was proper because the protester had an organizational conflict of interest.

**PROCUREMENT** B-231092 July 25, 1988  
Competitive Negotiation 88-2 CPD 78  
Technical evaluation boards  
Bias allegation  
Allegation substantiation  
Evidence sufficiency

Speculation that evaluation committee was biased in favor of the awardee provides no basis upon which to question the award where there is no evidence that alleged friendship of agency official with awardee affected the evaluation of proposals, and the record provides a reasonable basis for agency conclusion that proposals were essentially equal with respect to technical merit and for subsequent agency determination to make award to the low-priced offeror.

**PROCUREMENT** B-231353 July 25, 1988  
Bid Protests 88-2 CPD 79  
Allegation substantiation  
Lacking  
GAO review

**PROCUREMENT**  
Bid Protests  
Bad faith  
Allegation substantiation  
Lacking

Protester contending that the contracting officer acted in bad faith must submit proof that the contracting officer had a specific and malicious intent to injure the protester.



**PROCUREMENT**  
**Bid Protests**  
**Moot allegation**  
**GAO review**

**B-231857 July 25, 1988**  
**88-2 CPD 81**

Where a procuring agency renders a protest academic by taking the corrective action requested by the protester, the General Accounting Office has no legal basis on which to find the protester entitled to recover its protest costs.

**PROCUREMENT**  
**Contractor Qualification**  
**Responsibility/responsiveness distinctions**  
**Competency certification**

**B-231858 July 25, 1988**  
**88-2 CPD 82**

The certificate of competency program addresses a small business concern's responsibility for purposes of receiving a government contract, and does not apply where the bid is nonresponsive.

**PROCUREMENT**  
**Sealed Bidding**  
**Bids**  
**Responsiveness**  
**Small business set-asides**  
**Compliance**

Bid on a total small business set-aside indicating that not all end items to be furnished would be produced by small businesses is nonresponsive.

**PROCUREMENT**  
**Contract Management**  
**Contract administration**  
**GAO review**

**B-231878 July 25, 1988**  
**88-2 CPD 83**

Question regarding fulfillment of payment and performance bond requirements, which are implemented after contract award, is a matter of contract administration not cognizable under General Accounting Office Bid Protest Regulations.

**PROCUREMENT**

**B-232001 July 25, 1988**

**Bid Protests**

**88-2 CPD 84**

**GAO procedures**

**Protest timeliness**

**Apparent solicitation improprieties**

**PROCUREMENT**

**Competitive Negotiation**

**Requests for proposals**

**Cost evaluation**

**Evaluation criteria**

**Applicability**

Protest that agency did not consider alleged cost savings accruing from protester's offer to waive termination costs otherwise due under predecessor contract is dismissed where solicitation did not provide for consideration of such cost savings and protester did not file initial protest until after the contract was awarded.

**PROCUREMENT**

**B-229735.2 July 26, 1988**

**Special Procurement**

**88-2 CPD 85**

**Methods/Categories**

**In-house performance**

**Cost estimates**

**GAO review**

There is no basis to question an agency's decision to retain services in-house rather than contract for them as a result of an Office of Management and Budget Circular A-76 cost comparison where the protester has not shown that the agency in its in-house estimate did not include costs for sandblasting or that the agency's estimate was unreasonable.

**PROCUREMENT**

**Bid Protests**  
**GAO procedures**  
**Protest timeliness**

**B-231177; B-231177.2**

**July 26, 1988**  
**88-2 CPD 86**

Allegations that contracting agency improperly accepted an offer that did not meet specific mandatory requirements set forth in the solicitation are dismissed as untimely, when raised over a month after award, although allegedly shortly after information concerning the basis of protest was received, since the protester failed to diligently seek information to determine whether a basis of protest existed.

**PROCUREMENT**

**Competitive Negotiation**  
**Offers**  
**Evaluation**  
**Administrative discretion**

Procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals and their evaluations will not be disturbed unless shown to be arbitrary or in violation of procurement laws or regulations. A mere disagreement between the protester and the agency over the technical evaluation is not sufficient to show that the evaluation was unreasonable.

**PROCUREMENT** B-231177; B-231177.2 Con't  
Competitive Negotiation July 26, 1988  
Requests for proposals  
Evaluation criteria  
Cost/technical tradeoffs  
Technical superiority

A protest against agency's allegedly improper evaluation of proposals is without merit where review of the evaluation provides no basis to question the reasonableness of the determination that the awardee submitted a technically superior proposal and, based on the solicitation evaluation formula, the awardee's proposal offered the combination of technical and price most advantageous to the government.

**PROCUREMENT** B-231490 July 26, 1988  
Sealed Bidding  
Hand-carried bids  
Late submission  
Acceptance criteria

A proposal hand-delivered after the time specified for receipt must be rejected as late where evidence of record does not support a finding that improper government action was the paramount cause of late receipt.

**PROCUREMENT** B-231871 July 26, 1988  
Socio-Economic Policies 88-2 CPD 87  
Small business set-asides  
Amendments  
Disadvantaged business set-asides  
Preferences

Determination by agency to amend a small business set-aside solicitation to allow a preference for small disadvantaged business 20 days prior to bid opening is proper when amendment is necessary to implement recent statute providing for an evaluation preference to small disadvantaged businesses.

**PROCUREMENT**

**B-232020 July 26, 1988**

**Bid Protests**

**88-2 CPD 88**

**Allegation substantiation**

**Lacking**

**GAO review**

Protest by other than low offeror, filed after closing date for receipt of proposals, that award to low offeror is contrary to statutes and regulations granting an evaluation preference to small disadvantaged business concerns is dismissed where solicitation did not provide for such preference and neither the statutes nor regulations, in effect at the time the solicitation was issued, required such a preference.

**PROCUREMENT**

**Bid Protests**

**GAO procedures**

**Protest timeliness**

**Apparent solicitation improprieties**

Protest that solicitation should have included an evaluation preference for small disadvantaged business concerns is untimely, since it alleges a solicitation impropriety apparent prior to closing date for receipt of proposals but was not filed before that time.

**PROCUREMENT**

**B-228396.4 July 27, 1988**

**Contractor Qualification 88-2 CPD 89**

**Responsibility**

**Contracting officer findings**

**Affirmative determination**

**GAO review**

In face of contention that responsibility determination amounted to bad faith General Accounting Office concludes that the determination was reasonable where, although awardee was undergoing bankruptcy proceedings, it provided a letter of commitment from financial institution for working capital to fund performance of the contract.





**PROCUREMENT**

**B-231403 July 27, 1988**

**Specifications**

**88-2 CPD 93**

**Minimum needs standards**

**Competitive restrictions**

**Justification**

**Sufficiency**

Protest that requirement for on-base switching equipment under solicitation for base telecommunications system unduly restricts competition is without merit where agency establishes that requirement is needed to minimize potential for disruption of on-base communications in all circumstances including emergency or wartime situations by maintaining system within the security of the base.

**PROCUREMENT**

**B-231478 July 27, 1988**

**Bid Protests**

**88-2 CPD 95**

**Allegation substantiation**

**Burden of proof**

**PROCUREMENT**

**Specifications**

**Minimum needs standards**

**Competitive restrictions**

**Justification**

**Sufficiency**

Protest that specification for "wet chemical" fire extinguisher system is unduly restrictive of competition is denied where the agency presents a reasonable explanation in support of the specification as necessary to meet its minimum needs and protester, while disagreeing with agency's analysis, fails to show that the exclusion of "dry chemical" system is clearly unreasonable.



**PROCUREMENT**  
**Sealed Bidding**  
**Bids**

**B-230987 July 28, 1988**  
**88-2 CPD 98**

**Error correction**  
**Pricing errors**  
**Line items**

Where workpapers contain clear and convincing evidence that the low bidder mistakenly failed to multiply the overhead rate for one line item by the number of months the bidder computed were needed to complete that line item, the General Accounting Office will not object to the procuring agency's decision to permit upward correction of the bid.

**PROCUREMENT**  
**Contractor Qualification**  
**Responsibility**

**B-231628 July 28, 1988**  
**88-2 CPD 99**

**Contracting officer findings**  
**Affirmative determination**  
**GAO review**

Protest that awardee will not perform the amount of work in labor surplus area as promised in its bid is a challenge of the contracting agency's affirmative determination of responsibility and is therefore not for General Accounting Office review except in limited circumstances not present here.

**PROCUREMENT**  
**Bid Protests**

**B-228470.2 July 29, 1988**  
**88-2 CPD 125**

**GAO procedures**  
**Preparation costs**

Protester may recover the costs of filing and pursuing its protest, including reasonable attorney fees, where the protest has been sustained, resulting in likely cost savings to the government, and no other remedy is available.

**PROCUREMENT** B-230013.2; B-230013.3  
Bid Protests July 29, 1988  
GAO procedures 88-2 CPD 100  
Protest timeliness  
Significant issue exemptions  
Applicability

Protest presented a significant issue justifying consideration on the merits even though it was untimely filed where, based on the fully developed record, it was clear that the contracting agency had unreasonably excluded the protester from the competitive range contrary to the procurement statutes and regulations.

**PROCUREMENT** B-230946 July 29, 1988  
Bid Protests 88-2 CPD 101  
GAO procedures  
Protest timeliness  
Apparent solicitation improprieties

Protest that agency should have given office space proposal greater credit for space use efficiency is denied since, although proposal included statement that a typical upper floor of proposed building achieves an 86 percent space utilization efficiency, there was no documentation in the proposal to support this assertion. Although protester argues that evaluation should have considered the space efficiency advantages of a single building and that agency should have requested and considered layout drawings, those factors were not listed in solicitation's evaluation criteria and if the protester objected to listed evaluation criteria, it was required to protest before initial closing date.

**PROCUREMENT**

**B-230946 Con't**

**Competitive Negotiation**

**July 29, 1988**

**Best/final offers**

**Cost estimates**

**Omission**

**Effects**

Protest that agency should have applied lower energy costs in evaluating proposal for lease of office space is denied where proposal included no information on energy costs which agency could use to quantify those costs for the proposed office space. An evaluation must be based upon the information included in a proposal, so that no matter how advantageous an offer may be, an offeror runs the risk of losing the competition if it does not submit an adequate proposal.

**PROCUREMENT**

**Competitive Negotiation**

**Offers**

**Evaluation**

**Office space**

Under solicitation for lease of office space which provided that cost to government for security services would be factored into evaluation of each offer, agency's method of evaluating security costs, which involved an assessment of security costs for each offer based on the specific characteristics of the space proposed in each offer, was reasonable.

Agency's evaluation of offer for lease of office space which did not add costs for rearrangement of work stations within currently leased space was proper since solicitation only called for evaluation to include cost of agency relocation from currently leased premises.



**MISCELLANEOUS TOPICS**

**MISCELLANEOUS TOPICS**

**B-159292 July 7, 1988**

**Finance Industry  
Financial institutions  
Stocks  
Refunds**

Under section 406(d) of Rural Electrification Act of 1936, as amended (REA Act), 7 U.S.C. § 946(d), patronage refunds on Class B stock of Rural Telephone Bank (Bank) may only be made in B stock of Bank. Only way in which B stockholders can obtain cash from their stock is through stock redemption. While matter is not free from doubt, such redemptions may be viewed as constructive dividends. Cash dividends on Class B stock are prohibited by section 406(d) of Act.

**MISCELLANEOUS TOPICS**

**Finance Industry  
Financial institutions  
Stocks  
Retirement**

Current Bylaws of Bank established vested right of prior redemption for Bank's Class A stock which would be impaired by proposal to amend Bylaws to permit retirement of Class B stock before retirement of Class A stock.

Neither Secretary of Agriculture nor Administrator of Rural Electrification Administration has authority under section 403(a) of REA Act, 7 U.S.C. § 943(a), to consent to Bank's amendment of its Bylaws to change government's right of prior redemption for its Class A stock. Any such consent should be specifically authorized by the Congress.

**MISCELLANEOUS TOPICS**  
**Law Enforcement**  
**Criminal law matters**  
**Collusion**  
**Bids**

**B-231846 July 13, 1988**

Protest that low bidder engaged in collusive bidding is dismissed because the issue is for resolution first by the contracting officer in the context of a responsibility determination and then, if collusion is suspected, by the Attorney General in a criminal investigation.

**MISCELLANEOUS TOPICS**  
**National Security/International Affairs**  
**Foreign aid programs**  
**Funds**  
**Use**  
**Accountability**

**B-231247 July 18, 1988**

The Anglo-Irish Agreement Support Act, Public Law 99-415, which authorizes the contribution of U.S. funds to support economic and social development in Ireland and Northern Ireland, does not specifically place any responsibilities on the Agency for International Development (A.I.D.) for insuring that any such contributions are ultimately used for the purposes designated by that act. The Act places accountability on the President by requiring prior annual certifications, and an annual report on whether the Act's objectives are being achieved.

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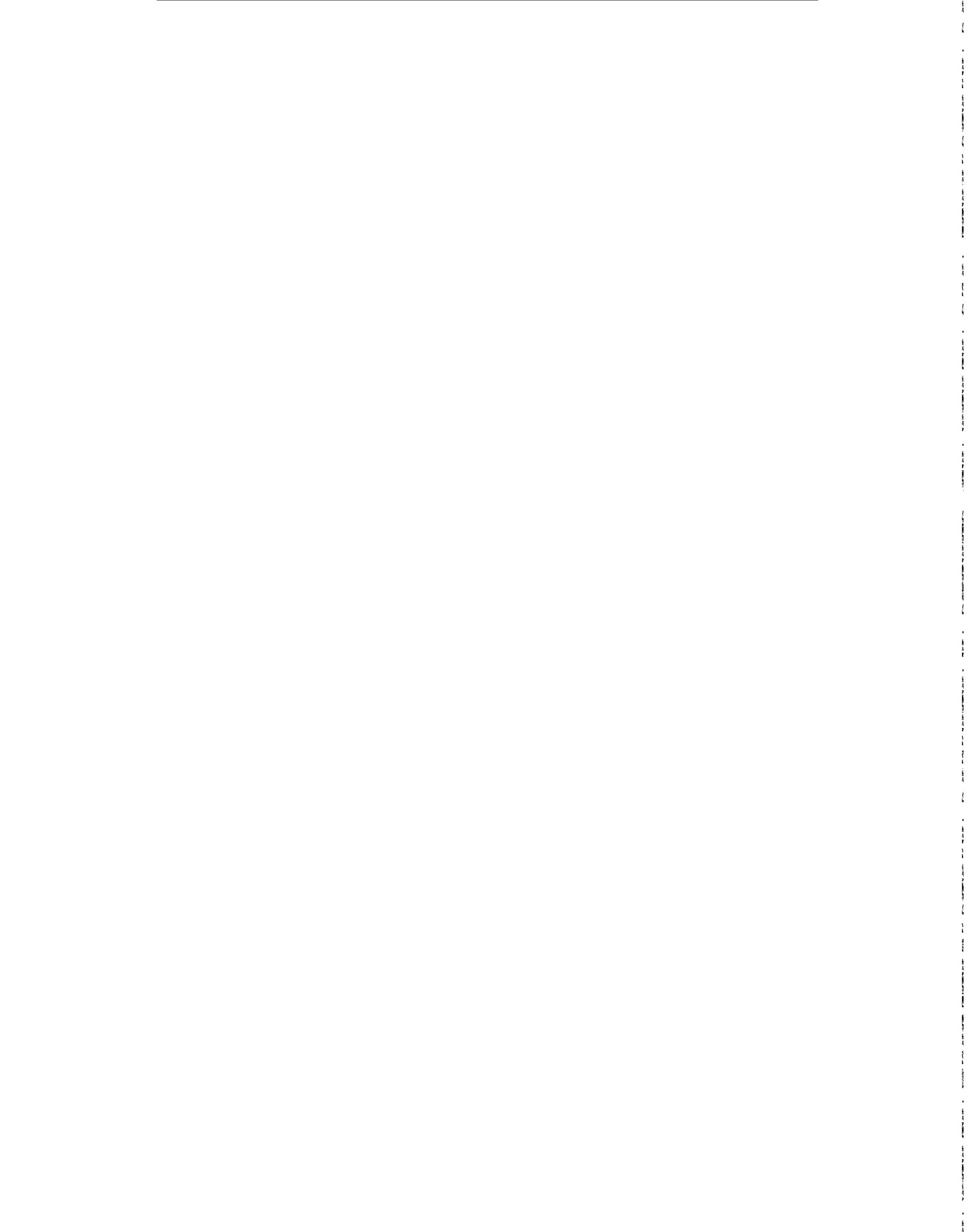
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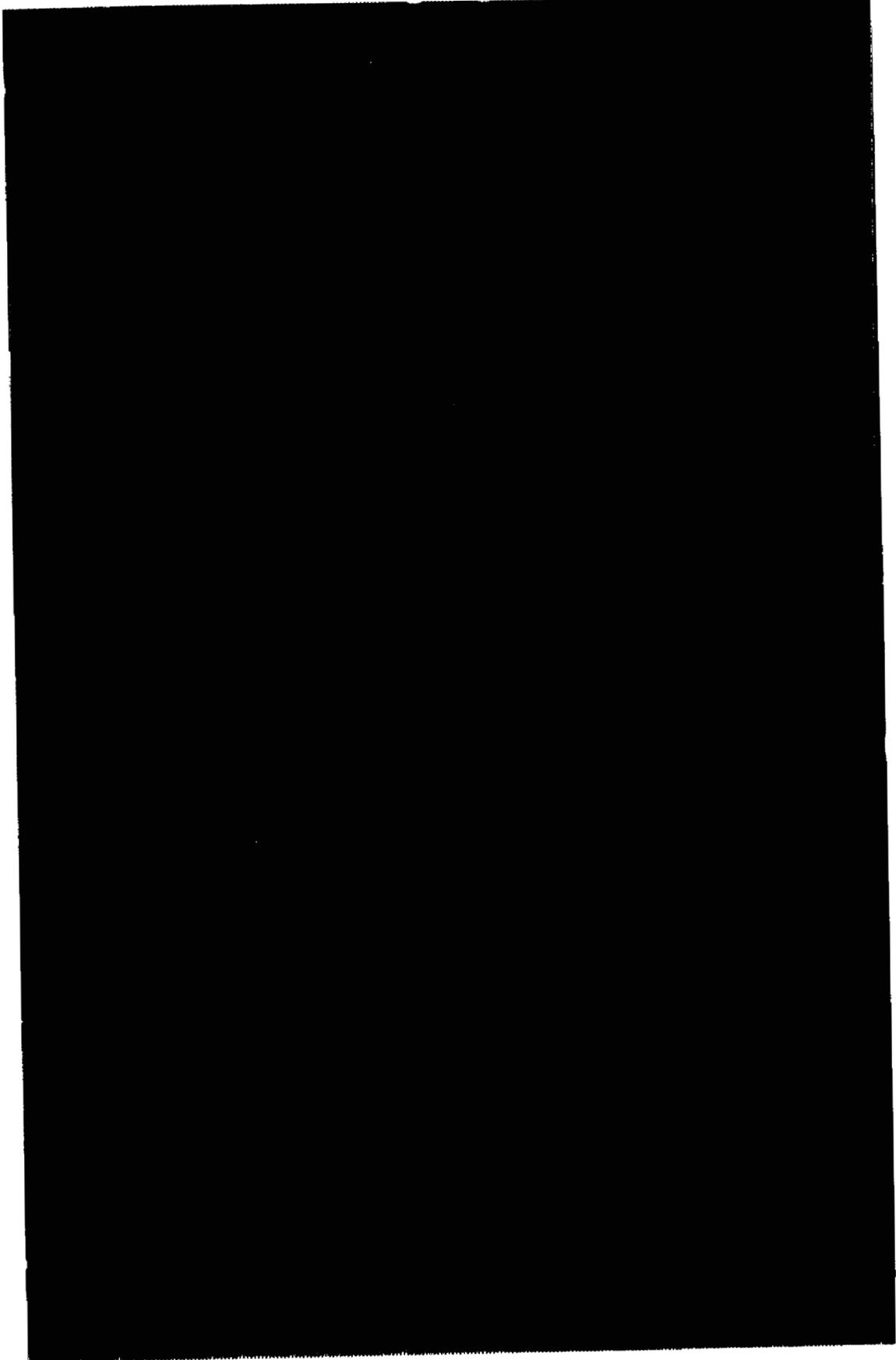
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